IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 33 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

VILAS @ CHINDHYA VASANT CHORE

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 33 of 1995

MS SADHANA SAGAR for Petitioner No. 1

THROUGH JAIL for Petitioner No. 1

MR KC SHAH,APP for Respondent No. 1

CORAM : MR.JUSTICE K.R.VYAS
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 27/11/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE AKSHAY H.MEHTA)

1. The appellant has filed this appeal under section 374(2) of the Criminal Procedure Code challenging the judgment and order of conviction and sentence passed by the learned Addl. Sessions Judge, Surat at Vyara, dated 17.12.1994 in Sessions Case No. 184 of 1993. Vide the said judgment, the appellant has been convicted for an offence made punishable under section 302 of the Indian Penal Code and he has been sentenced to suffer imprisonment for life and to pay a fine of Rs. 5000/-, in default, S.I. for two years.

2. According to the prosecution, the deceased Minaben was staying at Sanjivnagar, Bardoli with her daughter Gitaben, aged 12 years and sons Rakesh and Ashwin. Her husband had died before six years and she was maintaining family by doing labour work. On 30.5.1993, at about 10.00 o'clock in the morning, she was at home with her children. At that time, the appellant came there and he started quarrelling with her on the ground that the deceased was having illicit affair with someone else. The appellant thereafter gave Rs.5/- to the son of the deceased Ashwin to get kerosene. When the deceased was having lunch with her children, the appellant sprinkled kerosene over her and ignited a match stick. He thereafter set fire to the deceased. When the deceased started burning, the appellant covered her with a quilt with a view to extinguish fire. The appellant thereafter ran away from the place. The deceased remained inside the house, but as somebody from the neighbourhood informed the police about the incident, police came there and removed her to Bardoli Government Hospital for treatment.

At the hospital, PSI Bardoli recorded her complaint at 2.00 p.m. He also arranged for getting the dying declaration of the deceased recorded by Executive Magistrate. The Executive Magistrate recorded the dying declaration and thereafter the deceased was on that very day, removed to Civil Hospital at Surat for further treatment where she died before any treatment could be given to her.

3. The police, during the course of investigation, recorded statement of various persons, got the panchanama of scene of offence drawn, arranged to hold inquest, arrested the accused and got the postmortem done by the Medical Officer at Surat and on completion of usual investigation, submitted chargesheet in the Court of learned Judicial Magistrate, First Class, Bardoli. The

learned Magistrate committed the case to the Court of Sessions as the offence under section 302 of Indian Penal Code is exclusively triable by the Court of Sessions.

4. At the trial, charge Ex. 2 was framed against the appellant who denied the same and claimed to be tried. In support of its case, the prosecution has examined Dr. Mayurbhai Padvi, PW 1 Ex.6, Gitaben Ashokbhai, PW 2 Ex.9, Rakeshbhai Ashokbhai, PW 3 Ex.10, Upendrabhai Mayurbhai Patel, PW 4 Ex.11, Vishwanath Kashiram Mistri, PW 5 Ex.13, Bhimabhai Devrambhai, PW 6 Ex.15, Chhatrasinh Ballubhai Parmar, PW 7 Ex.18, Gurjibhai Hakshibhai, PW 8 Ex.20, Babubhai Hiralal Surti, PW 9 Ex.21 and Dr.Meghrekha Hasmukhbhai Mehta, PW 10 Ex.23. Over and above the oral evidence, the prosecution also relied upon certain documentary evidence, such as FIR dated 30.5.1993, medical certificates which are pertaining to the injuries suffered by the deceased at Ex. 7 and the appellant at 8. The dying declaration Ex. 12, the inquest panchanama Ex. 16, panchanama of scene of offence Ex.14 etc.

5. After recording of the evidence was over, in further statement under section 313 of the Code of Criminal Procedure, the appellant was apprised of all the circumstances appearing against him in the evidence to enable him to offer explanation, if he so desired. The appellant, except denying the case of the prosecution as being false, has not come out with any specific case. He has neither examined any witness nor examined himself in his defence.

6. At the conclusion of the trial, the learned trial judge came to the conclusion that the prosecution had proved beyond any reasonable doubt that the appellant had illicit relations with the deceased and he was keeping her as his mistress. He also came to the conclusion that the prosecution had been able to prove beyond any reasonable doubt that the appellant entertained a suspicion that the deceased was maintaining illicit relations with someone else and on account of that suspicion, with a view to cause her death, he poured kerosene over her and ignited her with a match stick and thereby caused her death. The learned trial judge, on the strength of these conclusions, held the appellant guilty of committing offence made punishable under section 302 of the Indian Penal Code and sentenced him to suffer imprisonment for life.

7. Ms.Sadhna Sagar, learned Counsel appearing for the appellant took us through the entire record of the

case and submitted that the order of conviction and sentence passed by the learned trial judge are not legal inasmuch as the prosecution has not been able to prove its case against the appellant beyond any reasonable doubt. She has further submitted that so far the oral evidence on record is concerned, there is no cogent and reliable evidence on which the conviction of the appellant can be based. According to her, the evidence of child witness Rakesh is tainted because he has been tutored by the police officer before he entered into the witness box and such evidence cannot be relied upon. She has further submitted that except the evidence of child witness Rakesh, there is no other evidence on record which is capable of implicating the appellant in the crime. Ms. Sagar has further submitted that so far the dying declaration is concerned, it cannot be relied on for any purpose because before recording the same, the Executive Magistrate has not obtained any certificate from the Medical Officer with regard to fitness of the mental as well as physical condition of the deceased at the time when she gave statement before the Executive Magistrate. According to her, the evidence of the prosecution itself indicates that the deceased had received burn injuries on account of accidental fire, but for some or the other reason, she has tried to falsely implicate the appellant in this crime. Finally, she has submitted that the present appeal deserves to be allowed.

As against that, the learned APP Mr. K.C.Shah, appearing for the State has submitted before us that the judgment and order of conviction and sentence recorded by the learned trial judge are proper and legal and they are not required to be disturbed by this Court.

8. With a view to appreciate the rival contentions, we have gone through the record of the case and appreciated the evidence afresh.

9. At the first instance, we may consider the medical evidence produced by the prosecution in support of its case that the deceased had died a homicidal death.

For that purpose, the prosecution has examined Dr. Mayurbhai Babubhai Padvi, PW 1 Ex. 6. This witness has stated that on 30.5.1993, one Dr. Vikas Pandit was serving as a Consultant in General Surgery Department of Sardar Smarak Hospital at Bardoli. At that time, this witness was not attached to that hospital, but he had joined the same on 2.5.1994. At the time of giving evidence, this witness had brought the original case papers of the hospital with regard to injuries suffered

by the deceased and the treatment given to her for the same. On referring to the said record, it is stated that deceased Minaben was brought to the said hospital for treatment as she had suffered burn injuries to the extent of 90% to 95%. She had suffered superficial as well as deep burns. During the course of his evidence, this witness has also produced two medical certificates duly signed by Dr. Pandit who had already left the employment of Sardar Smarak Hospital before the evidence of this witness came to be recorded and his whereabouts were not known and, therefore, he was not available for giving evidence before the Court. The medical certificates have been taken on record pertaining to injuries received by Minaben and the appellant. They have been duly exhibited as Ex. 7 and 8. This witness has further stated that the appellant was also admitted in the hospital on 30.5.1993 and he was discharged on 21.6.1993. During this time, he was kept as an indoor patient in the said hospital. According to this witness, the appellant had received burns to the extent of 32%. He had received burn injuries on both the hands, on the neck and also on the chest. The appellant had also received burn injuries on both the legs. He was discharged from the hospital as he had completely recovered from his injuries. This witness has further stated that after giving initial treatment to the deceased Minaben, she was referred to the Civil Hospital at Surat. In the cross-examination by the defence, he has stated that when Dr. Pandit was serving in Sardar Smarak Hospital, this witness was doing his internship in Surgical Department of that hospital and Dr. Pandit had many occasions to sign papers in his presence. He has admitted in his cross examination that the record brought by him did not show the percentage of burns received by the deceased Minaben. However, he has explained that when Minaben was brought to Sardar Smarak Hospital, she was not admitted as an indoor patient, but after giving preliminary treatment in the OPD, she was sent to the Civil Hospital at Surat. He has further explained that though the case papers did not indicate the percentage of burns received on each part of the body, the record showed the total extent of percentage of burns received by deceased Minaben. The defence has not been able to bring out any material from this witness which could have adverse effect on the prosecution's case. The medical certificate at Ex. 7 issued by Sardar Smarak Hospital, Bardoli clearly shows that the deceased Minaben had received 90% to 95% superficial to deep burns.

10. The prosecution has also examined Dr. Meghrekha Hasmukhbhai Mehta, PW 10 Ex.23. This witness has stated

that on 31.5.1993, she was attached to the new Civil Hospital, Surat as Medical Officer and on that day, at about 10.00 p.m., Police Constable Mahendra Maganbhai of Umra Police Station had brought the dead body of Minaben Ashokbhai Gamit i.e. the deceased for its autopsy. According to this witness, she had started postmortem examination of the dead body at 10.05 a.m. and had completed it at 11.30 a.m. According to this witness, there were 85% to 90% of superficial to deep burns on the body of Minaben. She has stated that the entire face except some portion of skull was burnt. The deceased had also received burns on the chest and stomach region. This witness had also found burns on the back of the body as well as on both the hands and legs except the palms and soles. Lastly, she had found that there were burn injuries on private part of the deceased. She has opined that the death of Minaben was caused due to shock on account of 85% to 95% of mixed burns. According to her, all these injuries were ante mortem. In support of her evidence, this witness has also produced the notes of postmortem prepared by her. The same have been taken on record at Ex. 24. According to this witness, the injuries suffered by the deceased were sufficient in the ordinary course of nature to cause her death. She had also issued certificate with regard to the death of Minaben which was duly produced with her evidence at Ex. 25.

In the cross examination by defence, this witness has denied that palms of both the hands were burnt. She has further stated that in the postmortem notes prepared by her, she had very specifically stated that the palms of both the hands were not at all burnt. She has also denied the suggestion of the defence that a patient would become unconscious if he or she has received burns to the extent of 85% to 90%. She has stated that in some cases, the patient would be conscious. She has further denied the suggestion of the defence that a patient who has received burns to the extent of 85% to 90% would raise cries on account of injuries suffered by the patient. She has further stated that the patient who has received deep burns would never raise cries.

11. Apart from the aforesaid medical evidence, there is inquest panchanama which is at Ex. 16 on the record of the case. This panchanama clearly shows that there were extensive burn injuries on the dead body of Minaben on different parts.

Considering the aforesaid medical evidence as well as inquest panchanama, we are of the opinion that the deceased Minaben had died a homicidal death i.e. she

had died on account of receiving burn injuries to the extent of 85% to 90% superficial to deep burns and the prosecution has been successful enough to establish the same.

12. We may now turn our attention to the other evidence with a view to ascertain whether the appellant can be held responsible for causing these burn injuries to Minaben and ultimately her death.

The prosecution, for that purpose, has examined Gitaben Ashokbhai, PW 2 Ex.9. In the examination -in chief, this witness has stated that on the day of the incident, the appellant was in their house and he was quarrelling with her mother. She has further stated that the appellant had asked her brother Rakesh to bring kerosene which was accordingly brought by Rakesh. She has further stated that while she was feeding her brother, there was all of a sudden, a blaze and she and her brothers immediately went out. She has also stated that at that time, the appellant had tried to extinguish fire and rescue her mother and in doing so, he had received burn injuries. She has also stated that thereafter she and her brothers had gone with one Bhagwanbhai to the police station and at the police station, complaint was lodged. According to her, her mother was at home and, therefore, the police people had gone with them to their house and in the meanwhile, the appellant had run away from there.

Since this witness did not support the prosecution, the learned APP declared her hostile and confronted her with her previous statement given before the police. The learned APP was, therefore, allowed to cross examine her. In the cross examination by the learned APP, this witness has stated that she had stated before the police that while they were having their lunch inside the house, the appellant sprinkled kerosene all over the body of her mother and ignited her with a match stick. She has further stated that the appellant had tried to extinguish fire by throwing a quilt over the body of her mother and in the process, he had also received burns. But thereafter the appellant had run away from the place. This witness has not been cross examined by the defence.

13. The prosecution has thereafter examined Rakesh Ashokbhai, aged 10 years, PW 3 Ex. 10. This witness being a child witness, the learned trial judge has first tried to ascertain whether the witness could understand the sanctity of oath and for that purpose, the learned

trial judge had put several questions to him. The first question put to the witness was whether he knew God and the witness gave answer in the affirmative. The second question put to him was whether he bowed down before the God which was also replied to in the affirmative. The Court thereafter specifically asked him that if he spoke a lie, what would happen and in answer to that question, the witness stated that he would commit a sin. Having heard the replies of the witness, the trial court was satisfied that the witness duly understood the sanctity of oath and, therefore, he was administered oath thereafter.

In the examination-in-chief, this witness has stated that on the day of the incident, he, his younger brother Ashwin, his sister Gita and his mother were in the house. He has further stated that about one year and eight months back from the date of recording of his evidence, he was in the house when his mother was burnt alive. According to this witness, the appellant had asked him to purchase kerosene worth Rs. 5/- ,which was purchased and brought by him. The container of kerosene was kept near the fire place. He has stated that while he was having his lunch, the appellant, all of a sudden, sprinkled kerosene over the body of his mother and ignited her with a match stick. On hearing this, all had raised shouts. He has further stated that to save his mother by extinguishing fire, the appellant had thrown a quilt over her body and thereafter he had run away. He has also stated that his grand mother and his maternal uncle Bhagwanbhai had come there and the police had also arrived there. The police had taken his mother to the hospital.

In the cross examination by defence, this witness has stated that it was true that when he came to the Court, the Police Head Constable had told him in what manner he should give reply. He has further stated that he was also taught by the Head Constable what he had to say in the Court. He has also admitted that there was, all of a sudden, a blaze and his mother was on fire and, therefore, the appellant had tried to cover her body with a quilt.

Considering the evidence of this witness, it clearly appears that he has fully supported the prosecution. We are also aware of the rule of prudence and settled principle of law that the evidence of child witness has to be accepted with great care and caution and if it is found that he has been tutored to give evidence which may suit the purpose of the prosecution,

such evidence of a child should not be relied on. The Court has first to satisfy itself that the child's evidence is absolutely untainted and uninfluenced. Then only reliance can be put on it. In the instant case, we find that in the examination-in-chief, witness Rakesh has completely supported the prosecution. However, in the cross examination, he has admitted that he was told by the Head Constable before he entered into the witness box what he was to say before the Court. In normal circumstances and if this was the only evidence available with the Court, we would not have placed any reliance on the same. However, we find that the evidence of this witness gets ample support and corroboration on all material aspects and from other unimpeachable evidence on record. We also find that this witness has not made any improvement in his earlier version i.e. the version given in the statement before police and he has all throughout adhered to the same. If any such improvement had been made, the defence would have certainly confronted him with his previous statement and would have brought on record the improvements made by him. In light of that, we are not inclined to discard the evidence of this witness. We find that the dying declaration given by the deceased which we would presently discuss and the medical evidence which we have already discussed above, give ample corroboration to the evidence of this witness and for that reason, we cannot accept the argument of Ms. Sagar that the evidence of this witness should not be relied on because he appears to be a tutored witness.

14. At this juncture, we may refer to the dying declaration of the deceased which is on record at Ex. 12 and which has been recorded by the prosecution witness Upendra Maganbhai Patel, the Executive Magistrate. The dying declaration has been recorded by the Executive Magistrate after revealing his identity to the victim and she has also been made known the purpose for which the same was being recorded. The dying declaration has been recorded in the question answer form. The first question is " Are you conscious? " and the reply is "Yes". The second question is "What is your name?" and the reply is "Minaben Ashokbhai Gamit". The third question is "What is your age?" which has been replied to as "35 years". The fourth question that has been put to her is "What is your occupation?" and the answer is "labour work". The fifth question that has been put to her is "Where do you stay?" and the answer is that she stays Behind Baben village at Bardoli. The sixth question put to her is "What has happened to you?" and in answer, she has stated that she has been burnt by Vilasbhai, the appellant by pouring kerosene all over her body. The next question is

"How it has happened?" and the answer is " Vilasbhai had kept her as his mistress and he entertained a suspicion that she was having illicit relation with someone else." In reply to the question "Who else was present?", she has stated that no one was present at that time. The last question put to her was "Whether she wanted to say anything else?" to which she replied "No".

Thus, the dying declaration has been duly signed by the Executive Magistrate as well as Dr. Kirit Chaudhari and deceased Minaben has put her thumb impression on it.

15. The prosecution has examined Upendrabhai Maganbhai Patel, PW 4 Ex. 16, Executive Magistrate who recorded the aforesaid dying declaration. This witness, in the examination-in-chief, has stated that on 30.5.1993, while he was on his duty, he had received a yadi from the police in which it was mentioned that one Minaben, the widow of Ashokbhai had received burns and her dying declaration was to be recorded. On receiving the yadi, he had immediately proceeded to Sardar Smarak Hospital, Bardoli and had made inquiry from the doctor as to where Minaben was kept. He has stated that after he met Minaben, he revealed his identity and he also asked her whether she was conscious and she answered in the affirmative. According to this witness, he had put several questions to her, reference to which has already been made above and he had recorded her dying declaration in the question answer form. He has also stated that at the time when the dying declaration was recorded, except him and Minaben, no one else was present. However, when the thumb impression of Minaben was taken on the dying declaration, the Medical Officer of the hospital was present and in his presence, the thumb impression was obtained. In the cross examination by the defence, this witness has denied the suggestion of the defence that since Minaben had received extensive burns, she was not in a position to speak. He has also denied the suggestion that at the time of recording dying declaration, the Medical Officer and PSI were present. He has also denied the suggestion of the defence that he had not revealed his identity and he had straight away obtained the thumb impression of Minaben on the dying declaration. The defence has not been able to bring out any material from this witness.

16. So far the aforesaid dying declaration is concerned, Ms. Sagar has submitted that it cannot be relied on because the Executive Magistrate has not obtained opinion of the Medical Officer prior to

recording it that Minaben was in a fit condition to give the dying declaration. It is true that no written endorsement certifying the fitness of the patient to give such dying declaration is to be found on record. However, there is other reliable evidence available on record to show that at the time when the dying declaration was recorded by the Executive Magistrate, the patient was fully conscious and was in a position to give statement before the Executive Magistrate. It may be noted here that the FIR has been given by the deceased Minaben herself when she was in Sardar Smarak Hospital at Bardoli. The information has been recorded around 2.00 o'clock and the same contains all the material details regarding the incident. The prosecution witness Chhatrasinh Ballubhai Parmar, PW 7 Ex. 38 has clearly stated in his evidence that when he went to the hospital, Minaben was fully conscious and was able to give answers to the questions put to her. He has also stated that when he recorded her complaint, the doctor was very much present there. Apart from this, even the Executive Magistrate has stated that before recording the dying declaration, he had inquired from Minaben whether she was fully conscious and was in a position to give answers to which she had replied in the affirmative. Moreover, the dying declaration also bears the signature of Dr. Kirit Chaudhari. All these circumstances show that Minaben was fully conscious when she gave the dying declaration before the Executive Magistrate and, therefore, even in absence of any endorsement certifying her fitness by the Medical Officer, there is other reliable and cogent evidence on record to accept the prosecution version that she was fully conscious when her dying declaration was recorded. We are, therefore, not inclined to accept the argument of Ms. Sagar on that count.

17. So far as the merits of dying declaration are concerned, we find that it is a truthful and untainted dying declaration. We also find that the deceased Minaben had no reason to falsely implicate the appellant in this crime. As has been observed by different Courts time and again, the dying declaration is undoubtedly admissible under section 32 and not being a statement on oath so that its truth could be tested by cross examination. The Courts have to apply the strictest scrutiny and the closest circumspection to the statement before acting upon it. While great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person, yet the Court has to be on guard against the statement of the deceased being a result of either

tutoring, prompting or a product of his imagination. The Court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased had a clear opportunity to observe and identify his assailants and that he was making the statement without any influence or rancour. Once the Court is satisfied that the dying declaration is true and voluntary, it can be sufficient to found the conviction even without any further corroboration.

It is clear from the prosecution evidence that the appellant was already known to Minaben and on the day of the incident, how she was set to fire by him. It is also clear from the prosecution evidence that Minaben had no axe to grind against him. Moreover, it is also found from the evidence on record that no outside agency had either tutored or prompted her to falsely implicate the appellant in this crime. In that view of the matter, we find that the dying declaration given by Minaben is absolutely truthful, untainted and can even safely be relied on for basing the conviction of the appellant. In fact, in this case, we have a corroborating evidence in the form of testimony of her son Rakesh in whose presence the incident had taken place. Therefore, no infirmity can be attached to this dying declaration and it can safely be relied on.

18. The prosecution has also produced other evidence in support of its case to describe the scene of offence etc. which is not of much relevance and which is not challenged by the other side and, therefore, it does not require any detailed discussion here.

19. In the end, we find that the prosecution has been able to prove beyond any reasonable doubt that the appellant had committed murder of deceased Minaben on 30.5.1993 and this appeal, therefore, does not have any merit and it deserves to be dismissed.

The appeal is, therefore, ordered to be dismissed. Muddamal to be disposed of in accordance with the directions of the trial court.

(K.R.Vyas,J.)

(Akshay H.Mehta,J.)

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